

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6100

To be argued by
FRANK H. SANTORO

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-6100

NORMAN F. DACEY,

Appellant,

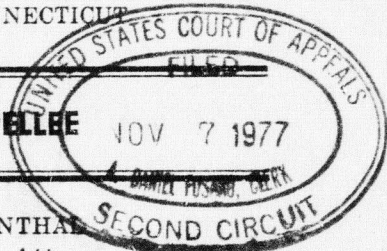
—v.—

PETER C. DORSEY, UNITED STATES ATTORNEY,
DISTRICT OF CONNECTICUT,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE



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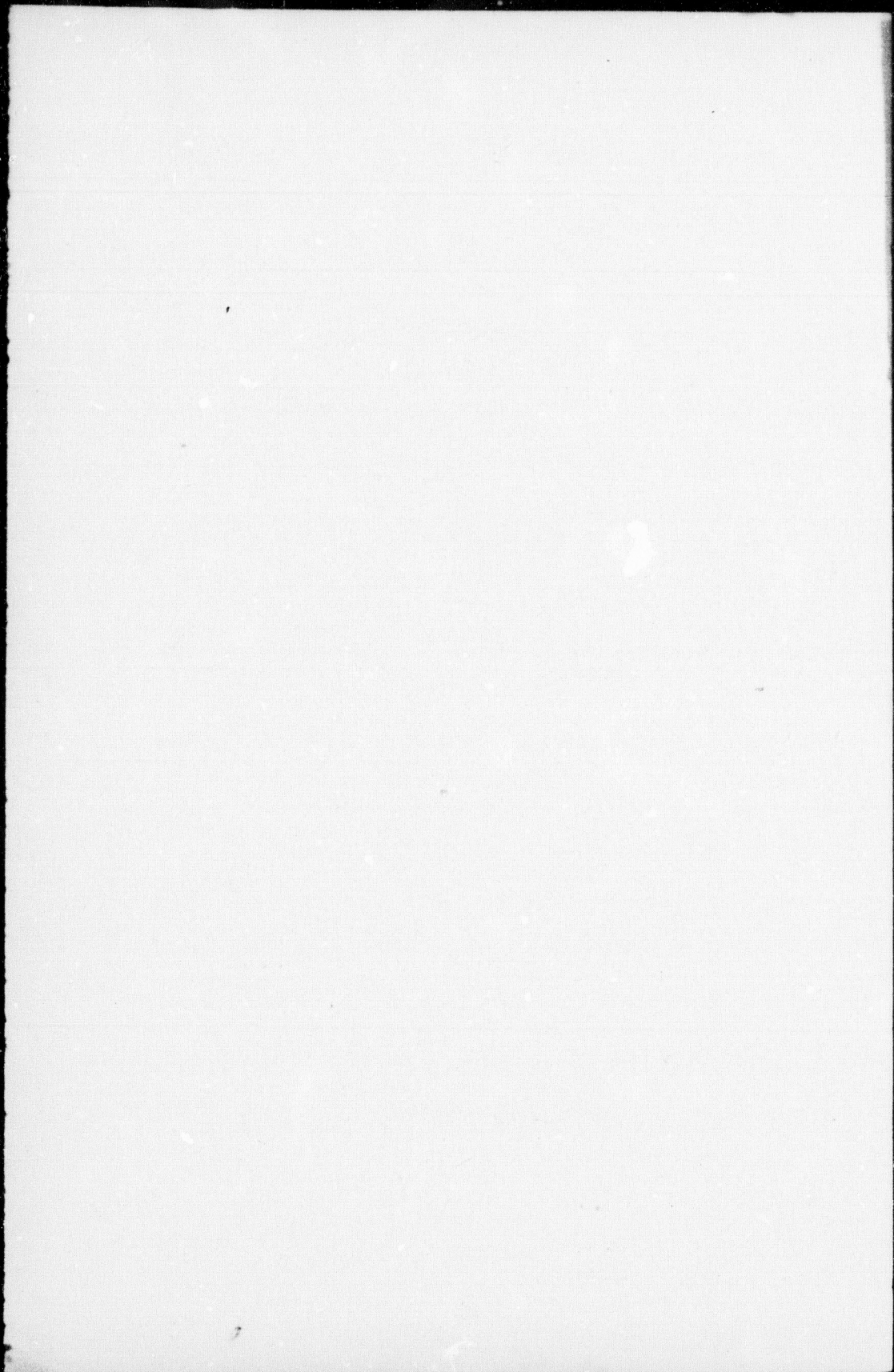


TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Statutes Involved	2
Questions Presented	3
Statement of Facts	3

ARGUMENT:

I.—The District Court was Correct in Ruling That Federal Prosecutors Enjoy Absolute Immunity from Civil Damages Under Title 42 U.S.C. § 1986	5
II.—The District Court was Correct in Ruling that the Decision to Prosecute is Within the Discretion of the United States Attorney and the Attorney General of the United States ..	9
III.—The District Court was Correct in Denying a Claim for Injunctive Relief	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:

<i>Dacey v. Connecticut Bar Association</i> , No. 129807 (June 13, 1974)	4
<i>Dacey v. Dorsey</i> , Civil No. B-76-190 (February 18, 1977)	5
<i>Dacey v. N.Y. County Lawyers' Association</i> , 423 F.2d 188 (2d Cir. 1969), <i>cert. denied</i> , 398 U.S. 929	8

	PAGE
<i>Economou v. United States Department of Agriculture</i> , 535 F.2d 688 (2d Cir. 1976)	7
<i>Fanale v. Sheehy</i> , 385 F.2d 866 (2d Cir. 1967)	8
<i>Fine v. City of New York</i> , 529 F.2d 70 (2d Cir. 1975)	8
<i>Gregoire v. Biddle</i> , 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)	8
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976)	5, 6, 7
<i>Inmates of Attica Correctional Facility v. Rockefeller</i> , 477 F.2d 375 (2d Cir. 1973)	9, 10, 11
<i>Littleton v. Berbling</i> , 468 F.2d 389 (7th Cir. 1972), cert. granted, 411 U.S. 915 (1973)	10
<i>Peek v. Mitchell</i> , 419 F.2d 575 (6th Cir. 1970) ...	9, 10
<i>Powell v. Katzenbach</i> , 359 F.2d 234 (D.C. Cir.), cert. denied, 384 U.S. 906 (1966)	9, 10
<i>United States v. Cox</i> , 342 F.2d 167 (5th Cir.), cert. denied sub nom. <i>Cox v. Hauberg</i> , 381 U.S. 935 (1965)	9
<i>Yaselli v. Goff</i> , 12 F.2d 396 (2d Cir. 1926), <i>aff'd</i> , 275 U.S. 503 (1927)	8

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—v.—

PETER C. DORSEY, UNITED STATES ATTORNEY,
DISTRICT OF CONNECTICUT,

Appellee.

BRIEF FOR THE /

Statement of the Case

On or about July 8, 1976, the petitioner, Norman F. Dacey commenced an action in the United States District Court for the District of Connecticut against the United States Attorney for the District of Connecticut, Peter C. Dorsey. The gravamen of the suit was a claim by the petitioner made pursuant to 42 U.S.C. § 1986 that the respondent failed to carry out measures necessary to preserve the petitioner's constitutional rights in an action then pending in the Connecticut civil courts.

On August 5, 1976, the respondent filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure alleging that the petitioner had failed to state a cause of action on which relief may be granted. The motion was supported by a Memorandum of Law.

On February 18, 1977, Judge Robert C. Zampano entered a memorandum of decision granting the respondent's motion to dismiss. Two days later, the Clerk of the United States District Court for the District of Connecticut entered judgment in accordance with Judge Zampano's decision.

On March 21, 1977, the petitioner filed a Motion for Alteration or amendment of judgment for the judgment entered on February 18, 1977. This motion was denied by Judge Zampano on May 17, 1977. This appeal followed.

Statutes Involved

Title 42, United States Code, Section 1983:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42, United States Code, Section 1986:

§ 1986. Same; action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his

legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding \$5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Questions Presented

1. Was the District Court correct in ruling that federal prosecutors enjoy absolute immunity from civil damages under Title 42 U.S.C. § 1986?
2. Was the District Court correct in ruling that the decision to prosecute is within the discretion of the United States Attorney and the Attorney General of the United States?
3. Was the District Court correct in denying the claim for injunctive relief?

Statement of Facts

In 1966, the petitioner published a book, *How To Avoid Probate*, which explained in layman's language the device of employing the inter vivos trust as a means for avoiding the probate system. The following year, the Connecticut Bar Association published a brochure in response

to the book which became the basis for a libel action brought by the petitioner against the Association.

On June 13, 1974, a jury in the Connecticut Superior Court found for the petitioner awarding him damages of \$60,000 dollars. *Dacey v. Connecticut Bar Association*, No. 129807 (June 13, 1974). The Connecticut Bar Association subsequently appealed the decision to the Connecticut Supreme Court.

On November 3, 1975, the petitioner moved that the justices of the Connecticut Supreme Court disqualify themselves because they were all members of the defendant Association and thus liable for proportionate shares of the damages. This motion was denied and on December 2, 1976, the Supreme Court heard oral argument. Decision was reserved until April 6, 1976 when the Court reversed the jury verdict and remanded the case for retrial.

On March 1, 1976, prior to the Connecticut Supreme Court ruling, the petitioner filed a complaint with the respondent alleging that the members of the Connecticut Supreme Court appeared to be conspiring to deprive him of his constitutional right to a fair trial. The petitioner later alleged that this deprivation was consummated on April 6, 1976, the date of the decision, and urged the respondent to protect the petitioner's rights under the Constitution as by Title 42 U.S.C. § 1983. The petitioner then alleged that the defendant did not carry out his duties as the Chief Federal Law Enforcement Officer for the District of Connecticut in that he failed to undertake a criminal prosecution against the Connecticut Supreme Court.

Based on the above allegations, on July 8, 1976, the petitioner brought a civil action for damages against the respondent claiming that the respondent's failure to prosecute the justices was a violation of his civil rights pur-

suant to Title 42 U.S.C. § 1986.* The respondent moved to dismiss the action for failure to state a claim upon which relief can be granted. F. R. Civ. P. 12(b)(6). The motion was granted on February 16, 1977, and from that decision, this appeal ensued.

ARGUMENT

I.

The District Court was Correct in Ruling That Federal Prosecutors Enjoy Absolute Immunity from Civil Damages Under Title 42 U.S.C. § 1986.

In the course of his opinion, Judge Zampano stated that:

[i]t is now well established that public prosecutors enjoy absolute immunity from civil suits for damages under both the common law and 42 U.S.C. § 1983 when acting within the scope of their prosecutorial duties. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

. . . Although *Imbler* was concerned with the liability of state prosecutors under § 1983, the same considerations of public policy apply to suits against federal prosecutors under § 1986.

Dacey v. Dorsey, Civil No. B-76-190 (Feb. 18, 1977) *Imbler v. Pachtman*, *supra*, is the leading case on prosecutorial immunity. There the petitioner, who was con-

* This action was brought against the respondent while acting in his official capacity as United States Attorney. Although he is no longer the United States Attorney, that mantle of official action remains and is the exclusive threshold for any allegations of liability.

victed of murder, obtained his release via a federal habeas corpus petition on the grounds that the prosecutor had knowingly used false testimony and suppressed material evidence at the petitioner's trial. The petitioner then brought an action against the prosecutor under Title 42 U.S.C. § 1983 seeking damages for loss of liberty caused by the unlawful prosecution.* The District Court held that the prosecutor was immune from liability under § 1983 and the decision was upheld by the Court of Appeals and the Supreme Court. In reaching its decision the Supreme Court looked to the immunity historically accorded to a prosecutor and the interest behind that immunity. Thus, the Court stated:

The common-law immunity of a prosecutor is based upon the same considerations that underlie the common law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust. *Imbler v. Pachtman, supra*, 424 U.S. at 422-23.

The Court then went on to determine if the same consideration of public policy which underlie common law immunity countenance absolute immunity under § 1983. In finding that they do, the Court stated that:

The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. . . .

* This is the usual situation in which actions for damages are brought against prosecutors. Here the petitioner is merely a complaining witness. His claim is thus all the more untenable.

Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

. . . Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials. *Imbler v. Pachtman*, *supra*, 424 U.S. at 424-26.

Thus, the decision is clear. A prosecutor is not liable for civil damages pursuant to an action based on § 1983. Furthermore, the manner in which the opinion is structured indicates that immunity would also lie for a federal prosecutor subject to an action for damages arising from § 1986. In essence, such was held in *Economou v. U.S. Department of Agriculture*, 535 F.2d 688, 695, n.7 (2d Cir. 1976).

The petitioner places a great deal of emphasis on the nature of the United States Attorney's functions as well as his status. He alleges that if some form of immunity does exist, a distinction is to be drawn between the prosecutorial and investigative capacities of the United States Attorney. He further alleges that the respondent was acting in his investigative capacity and as a result is not entitled to absolute immunity associated with the judicial phase of the criminal process. Instead, he is entitled only to a good faith defense comparable to that of a policeman. There is no merit to this argument, however. To the extent that there has been any distinction between the prosecutorial and other phases of a prosecutor's duties, the action (or lack thereof) here

complained of clearly falls within the ambit of that to which immunity has been traditionally accorded. See *Imbler, supra*, nn. 32, 33; *Fine v. City of New York*, 529 F.2d 70, 73 (2d Cir. 1975); *Dacey v. N.Y. County Lawyer's Assoc.*, 423 F.2d 188, 192 (2d Cir. 1969), *cert. denied*, 398 U.S. 929 (1970); *Fanale v. Sheehy*, 385 F.2d 866 (2d Cir. 1967); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir.), *cert. denied*, 339 U.S. 949 (1950); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927).

The policy considerations discussed above apply with equal force to the United States Attorney's prosecutorial and investigatory capacities, and the respondent's action is not subject to even a colorable claim of bad faith. As the petitioner's original complaint involved a civil rights violation, it is subject to review by the Civil Rights Division of the Justice Department. In referring the Complaint to Washington, the respondent was following the required procedure.* The Civil Rights Division found that there was no violation of a Federal Criminal Statute and this finding was the basis for the respondent's decision not to prosecute. The respondent's entire cause of action has been totally consistent with that category of activity which the Supreme Court has unequivocally held to be immune.

* Referral in this case was even more compelling in that the grounds for disqualification claimed by the petitioner as against the Supreme Court Justices, was equally applicable to the respondent who is also a member of the Connecticut Bar Association.

II.

The District Court was Correct in Ruling that the Decision to Prosecute is Within the Discretion of the United States Attorney and the Attorney General of the United States.

The decision to prosecute has always been within the discretion of the prosecutor. See *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973); *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970); *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir.), cert. denied, 384 U.S. 906 (1966); *United States v. Cox*, 342 F.2d 167 (5th Cir.), cert. denied sub nom., *Cox v. Hauberg*, 381 U.S. 935 (1965). In *Rockefeller*, Judge Mansfield stated that:

federal courts have traditionally and to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made. *Inmates of Attica Correctional Facility v. Rockefeller*, *supra*, 477 F.2d at 379.

The primary reason for the judicial aversion to compel prosecution has been grounded upon the separation of powers doctrine. *United States v. Cox*, *supra*, 342 F.2d at 171. Additional grounds are the policy considerations discussed with regard to immunity. Many cases are interrupted short of a jury's verdict by the exercise of prosecutorial discretion. Such determinations may be based upon a wide variety of factors such as legal positions which reveal that prosecution is not warranted, insufficiency of the evidence, credibility of witnesses, a more appropriate means of redress, or other related con-

siderations. To account for these determinations at the whim of every person who asserts the slightest interest in a possible prosecution would only result in chaos.

III.

The District Court was Correct in Denying a Claim for Injunctive Relief.

While injunctions and writs of mandamus are generally the proper remedies afforded to Civil Rights Act Violations, these avenues of relief do not override the doctrine of prosecutorial immunity. See *Inmates of Attica Correctional Facility v. Rockefeller*, *supra*, 477 F.2d at 382-83; *Peek v. Mitchell*, *supra*, 419 F.2d at 578; *Powell v. Katzenbach*, 359 F.2d at 234. In *Peek*, the Court stated that:

. . . the federal courts must achieve a balance between the protection of undivided rights and the freedom of public officials to exercise their necessary expertise in performing their duties. This is an era of increased litigation involving alleged civil rights violations, and the Court must shield the responsible public officials against any abusive use of the civil rights legislation. *Peek v. Mitchell*, *supra*, 418 F.2d at 578.

The only authority supporting the petitioner's position is *Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1972), *cert. granted*, 411 U.S. 915 (1973). There a class of black citizens of Cairo, Illinois brought suit for damages and injunctive relief against a state prosecutor, among others, charging that he had applied the state criminal laws so as to discriminate against their class. The decision, however, is clearly distinguishable. There the claim alleged a systematic and lengthy course of racial

discrimination. Furthermore, the decision does not appear to have compelled the institution of criminal prosecution which is one of the avenues of relief sought here. As a result, ". . . *Littleton* should be strictly limited to its peculiar facts, . . ." *Inmates of Attica Correctional Facility v. Rockefeller, supra*, 477 F.2d at 383. Thus, the petitioner is not entitled to the requested injunctive relief.

CONCLUSION

For all the foregoing reasons, the respondent's Motion to Dismiss for failure to state a claim upon which relief can be granted was properly granted in the District Court.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-6100

NORMAN F. DACEY,
Appellant

PETER C. DORSEY, UNITED STATES ATTORNEY,
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Appellee

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent
is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave
Brooklyn, N.Y.

That on the 7th day of November, 1977, deponent
served the within Brief for the Appellee
upon Mr. Norman F. Dacey
3200 Park Ave, Bridgeport, Connecticut 06604

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the
purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post
office official depository under the exclusive care and custody of the United States Post Office department
within the State of New York.

Sworn to before me,

Albert Sensale

This 7th day of November 1977

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1979

